

Kelly Kumm  
Attorney at Law  
Idaho State Bar No. 3252  
1305 East Center Street  
Pocatello, Idaho 83201  
Telephone (208) 232-4051  
Facsimile (208) 232-2880

Attorney for Defendant

U.S. COURT  
ON OCT 27 PM 3:50  
CLERK OF DISTRICT COURT  
N  
CAMERON STEWART

**UNITED STATES DISTRICT COURT FOR  
THE DISTRICT OF IDAHO**

UNITED STATES OF AMERICA, )  
)  
Plaintiff, )  
)  
vs. )  
)  
AMY R. FLUCKIGER, )  
a.k.a AMY BROWN, )  
)  
Defendant. )  
\_\_\_\_\_ )

CR- 03-217-E-BLW

**DEFENDANT'S REPLY  
BRIEF**

Fluckiger agrees with the government's statement of the law as it applies to the case at bar. Fluckiger has an obligation to initially show the charges were filed against her because she exercised a statutory, procedural or constitutional right in circumstances that give rise to "an appearance of vindictiveness." See Response to Defendant's Motion to Dismiss, p.3. Once that showing has been made, the burden shifts to the government to show the charges did not rise from a vindictive motive or were justified by "independent reasons or intervening circumstances" that dispelled the appearance of vindictiveness. *Id.* (Citations omitted.)

The government now urges this court to find that there are independent reasons or intervening circumstances which dispel the appearance of vindictiveness. In particular, the government asserts that an investigation which was commenced immediately after Fluckiger's aborted testimony at the Quinonez sentencing hearing justified the charges.

This becomes a chicken or the egg argument. The government asserts that, in the course of the Quinonez sentencing hearing, "new" or "corroborating" information came to light which prompted further investigation into Fluckiger's drug dealing history, which led to the grand jury's indictment. Fluckiger asserts that the "new" or "corroborating" information, information which was available to the government for months, had no significance but for the fact that Fluckiger asserted her 5<sup>th</sup> Amendment right to not testify and to consult with counsel before testifying further at the Quinonez sentencing hearing. The government doesn't explain why there was no attempt to "corroborate" Fluckiger's statements until after her court appearance.

The government wants to ignore the plain fact that all of this "new" information was acquired immediately after Fluckiger's aborted testimony. Indeed, the Barajas interview which the government contends supported and pointed towards more corroborating information, was conducted at 7:30 p.m., on May 15, 2003 just hours after Fluckiger left the stand. Moreover, the Barajas statement confirmed only that Amy Brown paid a sum of money to Gloria Barajas. It did not confirm that the money was paid for drugs, that Barajas knew it was for drugs or that Barajas even knew to whom the money was owed. See Barajas report of interview, attached to this brief as Exhibit "A".

The government wants to minimize the importance which it attached to Fluckiger's testimony and her refusal to testify. However, the government's own Response acknowledges that it sought a Writ of Habeas Corpus *Testificandum* to bring Fluckiger to Pocatello from her

incarceration in Boise, it issued a subpoena on May 14 to compel her attendance at the hearing, it prepared a letter purporting to immunize her testimony on May 15, and, finally, it concededly made several attempts to contact Fluckiger's local counsel on the 14<sup>th</sup> and 15<sup>th</sup>. It doesn't take a giant leap in logic to conclude that, after all these efforts to secure Fluckiger's testimony, that the government became upset and disappointed over her failure to testify and how the government's reaction blossomed into a motive for vindictiveness.

None of the so-called "corroborating information" which came to light subsequent to Fluckiger's aborted testimony was information or evidence which could not have been obtained during the primary investigation into the Quinonez conspiracy. None of the alleged "independent" or "intervening circumstances" alleged by the government are sufficient to dispel the appearance of vindictiveness. All of the investigation into Fluckiger subsequent to her court appearance was made at the direction of the government.

To punish a person because she has done what the law plainly allows her to do is a violation of due process "of the most basic sort." Bordenkircher vs. Hayes, 434 U.S. 357, 363, 98 S. Ct. 663, 668, 54 L.ed. 2.d 604. See also Bordenkircher, supra, Footnote 4 "For an agent of the state to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is patently unconstitutional." Quoting Chaffin vs. Stynchcombe, 412 U.S. 17, 32-33, Note 20, 93 S. Ct. 1977, 1986, 36 L.ed 2.d 714.

Bordenkircher was the first case in which the United States Supreme Court considered an allegation of vindictiveness which arose in a pretrial setting. There, the court held that the due process clause of the 14<sup>th</sup> Amendment did not prohibit a prosecutor from carrying out a threat, made during plea negotiations, to bring additional charges against an accused who refused to plead guilty to the offense with which he was charged. Supra, 457 U.S. 368, 377, 102 S. Ct.

2485, 2491. Bordenkircher is distinguished from the case before this court in that there were no plea negotiations, indeed, no charges, being pursued or pending at the time Fluckiger exercised her right not to testify. To Fluckiger's knowledge, the government never threatened, nor even disclosed, the possibility of charges if Fluckiger failed to testify.

The government relies upon United States vs. Goodwin, for the proposition that the failure of a defendant to plead guilty to lesser charges followed by the bringing of more serious charges is insufficient to warrant a presumption of vindictive prosecution. Such a reading of Goodwin would be simplistic and wrong. The court in Goodwin examined the circumstances leading to the filing of more serious charges and found a number of factors which mitigated against a presumption of vindictiveness, including the fact that different prosecutors were involved in the misdemeanor and felony offenses charged (felony prosecutor had no motive to be vindictive) and that the felony prosecutor filed an affidavit setting forth his reasons for the more serious charges. The affidavit contained the type of independent and intervening circumstances which justified the felony charges and mitigated against a presumption of vindictiveness. Nowhere did the court hold that bringing more serious charges after a refusal to plead guilty to lesser charges, in and of itself, is insufficient to warrant a presumption of vindictive prosecution.

Likewise, in United States vs. Gardner, the government again contends that bringing more serious charges against a defendant who has already been charged, is entirely appropriate when the defendant declines to cooperate in another investigation. However, again, the court in Gardner clearly found that, where given a choice of cooperating with the government or facing another indictment, Gardner was free to accept or reject the offer proposed by the government. Gardner knew and accepted the consequences of his refusal to cooperate. Such was not the case here. Fluckiger was given no choices. She was not advised of the possibility of new charges.

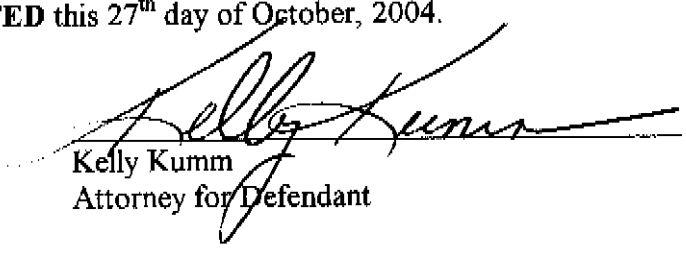
(Fluckiger, however, does assert that the A.U.S.A. made a veiled threat that "more indictments" may be necessary.) She was not advised of the consequences of her failure to testify. Instead, she merely asserted a legal right, i.e. a right not to talk to the authorities or to testify against Quinonez. Fluckiger contends it was the mere exercise of these rights that led to the prosecution in the case at bar. Had Fluckiger been completely advised of her options, and discussed the same with an attorney, as the government concedes she had frequently requested, the choices she made may have been completely different.

Clearly, the court should encourage and tolerate the negotiation of pleas, including whether or not new or stronger charges shall be brought against a defendant. The court should not tolerate, however, the government's unilateral, heavy-handed treatment of defendants, or potential defendants, who fail or refuse to assist the government with ongoing prosecutions. Charging defendant's with serious offenses after they assert a legal right, without any opportunity to consult counsel, violates all traditional notions of fair play. The "intervening investigation" did not dispel the appearance of vindictiveness.

In the case at bar, the timing of the prosecutor's actions in pursuing an investigation of Fluckiger and, ultimately, in indicting her suggest a presumption of vindictiveness is warranted. In Goodwin, it was the timing of the prosecutor's actions which suggested that a presumption of vindictiveness was not warranted. *Supra* at 381-382, 102 S. Ct. 2485, 2493. Moreover, the Goodwin court explicitly found that its holding did not "foreclose the possibility that the defendant in an appropriate case might prove objectively that the prosecutor's charging decision was motivated by a desire to punish him for doing something that the law plainly allowed him to do. *Supra* at 384, 102 S. Ct. 2485, 2494. (Footnote omitted.)

Fluckiger will show, throughout the course of her upcoming hearing on her Motion to Dismiss, that the government's charging decision had the reasonable likelihood of being based on vindictiveness. As such, a violation of the Due Process Clause of the 14<sup>th</sup> Amendment of the United States Constitution has arisen and this case should be dismissed forthwith.

**RESPECTFULLY SUBMITTED** this 27<sup>th</sup> day of October, 2004.

  
Kelly Kumm  
Attorney for Defendant

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that on this 27<sup>th</sup> day of October 2004, I caused a true and correct copy of the foregoing **DEFENDANT'S REPLY BRIEF** to be delivered to the party named below, as follows:

Michael Joseph Fica, Esq.  
Assistant United States Attorney  
801 E. Sherman  
Pocatello, ID 83201  
Fax No. 478-4175

☐ By U. S. Mail  
☐ By Facsimile  
☒ By Hand Delivery

  
Kelly Kumm

COPY

## OFFICIAL USE ONLY



Idaho State Police

## REPORT OF INVESTIGATION

<b>INCIDENT:</b> 06/02/2003 44-Interview Barajas		
<b>DATE OF REPORT:</b> 06/02/2003	<b>TITLE:</b> 44-Interview Barajas	<b>WITNESS:</b> Mike Fica, AUSA S/A Gary Peters, IRS
<b>REPORT BY:</b> BRUSH, GARY STEVEN	<b>CASE STATUS:</b> PENDING	
<b>CASE NUMBER:</b> 2000-00212	<b>DISTRIBUTION:</b>	
<b>REGION - COUNTY:</b> 5 Pocatello - BANNOCK		

**Synopsis:**

On May 15, 2003 at approximately 7:30 p.m., Department of the Treasury, Internal Revenue Service Special Agent Gary Peters and I interviewed Gloria BARAJAS at the Federal Court House. Mike Fica (AUSA) and S. Richard Rubin (BARAJAS's attorney) were present during the interview. BARAJAS informed us about her contacts with Amy FLUCKIGER. The investigation is continuing.

**Details:**

1. On May 15, 2003 at approximately 7:30 p.m., Department of the Treasury, Internal Revenue Service Special Agent Gary Peters and I interviewed Gloria BARAJAS at the Federal Court House.
2. During the interview BARAJAS informed Special Agent Peters and me of the following:
  - a. The first time BARAJAS met Amy FLUCKIGER was January 10, 2002, the day after Idaho State Police served a search warrant at QUINONEZ's residence located at 233 N. Grant, in Pocatello, Bannock County, Idaho.
  - b. FLUCKIGER came to QUINONEZ's residence and informed BARAJAS that she had money she owed to QUINONEZ. She believed the money was for drugs.
  - c. Because of the search warrant being served on the previous day, and that she didn't know FLUCKIGER, she made arrangements to meet with FLUCKIGER at a later date.
  - d. During the following weekend, FLUCKIGER paid BARAJAS twenty-four hundred dollars (\$2,400) in U. S. currency in a Wal-Mart restroom located in Pocatello, Bannock County,

Idaho.

3. At approximately 9:00 p.m. the interview with Gloria BARAJAS was concluded.

**Subject Data:**

BARAJAS, Gloria

FLUCKIGER, AMY RENEE aka Brown, Amy

<b>NAME:</b>	FLUCKIGER, AMY RENEE		
<b>ROLE:</b>	SUSPECT	<b>SEX:</b>	Female
<b>BIRTH DATE:</b>	08/22/1973	<b>BIRTH PLACE:</b>	
<b>RACE:</b>	White	<b>SKIN COLOR:</b>	Light
<b>HEIGHT:</b>	5' 3"	<b>WEIGHT:</b>	120
<b>EYE COLOR:</b>	Blue	<b>HAIR COLOR:</b>	Blond or Strawberry
<b>SSN:</b>	519-29-4995	<b>FBI NUMBER:</b>	
<b>PASSPORT ID:</b>			
<b>ALIASES:</b>	• BROWN, AMY RENEE - License Number DA105455E		
<b>LICENSES:</b>	• ID DA105455E Expires --/--/----		
<b>PRIOR RECORD:</b>	UNKNOWN		

NO MUGSHOT

<b>SIGNATURE:</b>  BRUSH, GARY STEVEN	<b>APPROVED BY:</b> 	<b>DATE:</b> 6-10-03
--	--	-------------------------